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ABSTRACT

In the case of "Pico v. Island Trees Union Free School District," involving school library censorship by a Long Island (New York) board, the U.S. Supreme Court in 1982 failed to decide whether board discretion or First Amendment rights should prevail, and instead remanded the case to lower courts. The author of this document first reviews the events leading up to the parents' suit against the board for removing books from the school libraries; he describes the decisions for the board in federal district court and for the parents in circuit court. Next he reviews the issues as seen in the Court's plurality opinion, by Justice Brennan, which emphasized First Amendment rights and the need to know the board's intent. He then explains dissenting opinions by Justices Burger, Powell, Rehnquist, and O'Connor, which saw the Court's action as an infringement on school boards' rights. Subsequently the author compares the two positions. He lists three conclusions about the case: first, that public education is the responsibility of states and school boards; second, that First Amendment cases engender confusing side issues; and, third, that boards should publish clear policies and apply them consistently. (RW)

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U.S. SUPREME COURT ATTEMPTS TO ESTABLISH NEW FIRST AMENDMENT "RIGHT": PICO V. ISLAND TREES SCHOOL BOARD

Writing in the March 1982 issue of the Phi Delta Kappan, Frank R. Kemmerer and Stephanie Abraham Hirsh reported that the United States Supreme Court had agreed to review a Long Island New York censorship case - Pico v. Island Trees Union Free School District.[1] Three months later - 25 June 1982 - the landmark decision that they predicted would have a profound impact upon the governance of public schools - turned out to be a judicial anomaly. Instead of providing the nation's public school districts with affirmative legal guidance the Court failed to reach a majority decision and remanded the case back to the lower courts.

The controversial nature of the case caused seven of the nine justices to write separate opinions and as Thomas Flygare[2] suggests, "provoked some of the strongest language seen in court opinions in some time."[3] From examination of the opinions reported one finds that four of the justices favored imposing constitutional restrictions on the removal of books from school libraries and four favored granting nearly full discretion to local school boards to determine what books the libraries should possess. On the basis of an opinion that unresolve factual issues and conclusions of law still existed, Justice Byron White straddled the fence and voted to remand the case to the lower courts for a full trial.

The Facts Established in Pico

The case began in September 1975, when three members of the Island Trees School Board (Long Island, New York) attended a conference sponsored by parents of New York United (PONYU), a parents' group favoring politically conservative educational positions. The board members obtained a list of books considered by PONYU to be inappropriate reading material for school children. After determining that some of the listed books were in the libraries of the Island Trees School District, the school board gave an "unofficial" direction to the superintendent and the principals involved that nine books located in the High School library and one in the Junior High School be removed from the shelves and delivered to the Board's offices, so that the Board members could read them.[4] When this directive was carried out, it soon became publicized, and the Board issued a press release justifying its action. It characterized the removed books as

"anti-American, anti-Christian, anti-Semetic, and just plain filthy," and concluded that, "It is our duty, our moral obligation, to protect the children in our schools from this moral danger as surely as from physical and medical harm."[5]

A short time later, the Board appointed a "Book Review Committee," consisting of Island Trees parents and four members of the Island Trees staff, to read the listed books and to recommend to the Board whether the books should be retained. The committee was instructed to take into account the books' "educational suitability," "good taste," "relevance," "appropriateness to age and grade level."[6] In July, 1976 the committee made its final report to the Board. It recommended that five of the listed books be retained[7] and that two others removed from the school libraries.[8] As for the remaining four books, the committee could not agree on two,[9] took no position on one,[10] and recommended that the last book be made available to students only with parental approval.[11] The Board substantially rejected the Committee's report deciding that only one book should be returned to the High School library without restriction,[12] that another should be made available subject to parental approval,[13] "but that the remaining nine books should be removed from elementary and secondary libraries and (from) use in the curriculum."[14] As a result the nine remaining books could not be assigned or suggested to students in connection with school work. However, teachers were not instructed to refrain from discussing the removed books or the ideas and positions expressed in them.[15] The Board gave not reason for rejecting the recommendations of the Committee that it had appointed.[16]

The Respondents (Steven A. Pico, Parents et al) reacted to the Board's decision by bringing action under 42 U.S.C. Section 1983 in the United States Court for the Easter District of New York. They alleged that the Board had

> "ordered the removal of the books from school libraries and proscribed their use in the curriculum because particular passages in the books offended their social, political and moral tastes and not because the books, taken as a whole, were lacking in educational value.[17]

The Respondents claimed that the Board's actions denied them their rights under the First Amendment. They asked the district court for a declaration that the Board's actions were unconstitutional, and for preliminary and permanent injunctive relief ordering the Board to return the nine books to the school libraries and to refrain from interfering with the use of those books in the school curricula. The District Court granted summary judgement in favor of the Board.[18] In the court's view "the parties substantially agreed about the motivation behind the board's action," namely that

> "the board acted not on religious principles but on its conservative educational philosophy, and on its belief that the nine books removed from the school library and curriculum were irrelevant, vulgar, immoral, and in bad taste, making them educationally unsuitable for the district's junior and senior high school students."

With this factual premise as its background the court rejected the students/parents contention that their First Amendment rights had been infringed by the Board's actions. Noting that statute, history, and precedent had vested local school boards with a broad descretion to formulate educational policy, the court concluded that it shou'd not intervene in "the daily operations of school systems" unless "basic constitutional values" were "sharply implicated" and

determined that the conditions for such intervention did not exist in the Pico case.[20] In it holding the court declared:

> "The board has restricted access only to certain books which the board believed to be, in essence, vulgar. While removal of such books from a school library may... reflect a misguided educational philosophy, it does not constitute a sharp and direct infringement of any first amendment right.[21]

The student'parent plaintiffs appealed the case to the United States Court of Appeals for the Second Circuit. A three judge panel reversed the judgement of the District Court, and remanded the action for trial on plaintiffs allegations.[22] Each judge on the panel filed a separate opinion.

Delivering the judgement of the court, Judge Sifton treated the case as involving "an unusual and irregular intervention in the school libraries' operations by persons not routinely concerned with such matters, and concluded that the petitioners (Board) were obliged to demonstrate a reasonable basis for interfering with respondent's (students/parents) First Amendement rights. He then determined that, at least at the summary judgement, petitioners had not offered sufficient justification for their action, and concluded that respondents "should have... been offered an opportunity to persuade a finder of fact that the ostensible justification for (petitioners) actions. . were simply pretexts for the suppression of free speech."[24] Judge Newton concurred in the result.[25] He viewed the case as turning on the contested factual issue of whether petitioners' removal decision was motivated by a justifiable desire to remove books containing vulgarities and sexual explicitness, or rather by an impermissible desire, to suppress ideas.[26] Upon petition of the Island Trees School Board the United States Supreme Court granted certiorari.[27]

The Issue as Seen by the Plurality

Writing for the plurality, Justice Brennan observed that the issue before the Court was "narrow... both substantively and procedurally."[28] He argues that it "may be restated as two distinct questions. First, does the First Amendment impose any limitations upon the discretion of petitioners to remove the library book from the Island Trees High school and Junior High School? Second, if so, did the affidavits and other evidentiary materials before the District Court,... raise a genuine issue of fact whether (the) petitioners might have exceeded those limitations?

In Justice Brennan's view the case hinged on what transcendent limitations are imposed on local school boards by the First Amendement. Admitting that "(we) are in full agreement with petitioners that local school boards must be permitted to establish and apply their curriculum in such a way as to transmit community values and that there is a legitimate and substantial community interest in promoting respect for authority and traditional values be they social, moral, political," he went on to contend that such discretion had to be exercised in a manner that comported with the transcendent imperatives of the First Amendment.[29] In support of his contention Justice Brennan argued that in West Virginia v. Barnette, 319 U.S. 624 (1943) the Court had held that under the First Amendment a student in a public school could not be compelled to salute the flag. "We reasoned

that

> Boards of Education... have, of course, important delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." Id., at 637

Citing an impressive array of First Amendment cases decided by the U.S. Supreme Court,[30] Justice Brennan argued that while school boards rightly possess "significant discretion to determine the content of their school libraries" that discretion may not be exercised in a narrowly partisan or political manner.[31] He went on to assert that "(our) Constitution does not permit the official suppression of ideas. Thus, whether petitioners removal of books from their school libraries denied respondents their First Amendment rights depends upon the motivation behind petitioners' actions."[32] Throughout his opinion Justice Brennan makes the point that nothing in the decision of the plurality affected "in any way" the discretion of local school boards to choose the books they wished to add to the libraries of their schools. But because they were concerned with the suppression of ideas their holding only affected the discretion to remove books.[33] In sum, the issue as viewed by the plurality concerned the fundamental intent of the school board in ordering the removal of the nine books. Because in their minds insufficient evidence concerning the true reason for the removal had not been obtained by the District Court, they voted to remand the case so that the Board's motivation could be more fully determined.

The Issue as Seen by the Dissent

Chief Justice Burger viewed the decision of the plurality as an attempt by the Court to infringe upon the local control of education. In his dissent he observes that

> "the issue comes down to two important propositions: First, whether local schools are to be administered by elected school boards, or by federal judges and teenage pupils; and second, whether the values of morality, good taste, and relevance to education are valid reasons for school board decisions concerning the contents of a school library. In a attempt to place this case within the protection of the First Amendment, the plurality suggests a new 'right' that when shown of the plurality's rhetoric, allows this Court to impose its own view about what books must be made available to students."[34]

The Chief Justice attacks the plurality's holding on three basis. First, that there is "not a hint in the First Amendment, or in any holding of the (U.S. Supreme) Court of a 'right' to have the government provide continuing access to certain books." Second, that local control of education involves "democracy in a microcosm" where parents in most public schools in the United States have and should continue to have, a large voice in running the schools. Third, that the Constitution does not dictate that judges, rather than teachers, parents, and local school boards, must determine how the standards of morality and vulgarity are to be treated in the classroom.[36] Finally, the Chief Justice contends

that if the decision of the plurality was to become law the U.S. Supreme Court would come "perilously" close to becoming a "super censor" of school library decisions.[37]

In his dissent Justice Powell remarks that the plurality opinion rejected a basic concept of public school education: that the States and locally elected school boards should have the responsibility for determining the educational policy of the public schools. He asserts that "after today's decision any junior high school student, by instituting a suit against a school board or a teacher, may invite a judge to overrule an educational decision by the official body designated by the people to operate the schools."[38] He states that he views the decision with "genuine dismay" because he believes that the resolution of educational policy decisions through litigation and the exposure of school board members to liability for decisions that affect such policy can be expected to "corrode the school board's authority and effectiveness."[39] In this connection he points out that judges are rarely as competent to make educational decisions as school authorities; nor are they are responsive to parents and the people of the school district. Probably the most important arguments that Justice Powell presents appear in his attack on the "new constitutional right announced by the plurality, which is described as "a right to receive ideas in a school." He contends, along with Chief Justice Burger and Justice Rehnquist, that "the new found right finds not support in the First Ammendment of (the) Court." "And even apart from the inappropriateness of judicial oversight of educational policy, the new constitutional right is framed in terms that approach a meaningless generalization. He goes on to observe that it affords little guidance to courts, "if they - as the plurality now authorizes them - are to oversee the inculcation of ideas. He presses the point home by stating

> "The plurality does announce the following standard: A school Board's 'discretion may not be exercised in a narrowly partisan or political manner.'... But this is a standardless standard that affords no more than subjective guidance to school boards, counsel, and to courts that will now be required to decide whether a particular decision was made in a 'narrowly partisan or political manner.' Even the 'Chancellor's foot' standard in ancient equity was never this fuzzy."[40]

Justice Powell concludes by saying: "For me, today's decision symbolizes a debilitating encroachment upon the institutions of a free people."[41]

To Justice Rehnquist the summary judgement of the District Court was correct as it stood. Because, in his view, the case only involved issues of fact, and presented nothing of sufficient general importance to warrant the substantial expenditure of the Court's time. He disagreed that a writ of certiorari should have been granted at all. However, once having taken that step, he indicates that the case should have been decided and disposed of. In this connection he disagreed with Justice White's conclusion that he (Justice White) need not decide the constitutional issue presented by the case until such time as a full trial had taken place.[41]

Justice Rehnquist took issue with Justice Brennan's opinion on the grounds that it is "analytically unsound and internally inconsistent." He justifies his disagreement on the basis that the

> "opinion deals far more sparsely with the procedural posture of the case than it does with the constitutional issues which it conceives to arise under the First Amendment." It first launches into a confusing, discursive exegesis on these constitutional issues as applied to junior high school and high school libraries,... and only thereafter does it discuss the state of the record before the court. Because the record facts should always establish the limits of the Court's constitutional analysis, and are particularly relevant in cases where the trial court has granted summary judgement, I think that Justice Brennan's approach violates our 'long... considered practice not to decide abstract, hypothetical or contingent questions, or to decide any constitutional question in advance of the necessity for its decision.'"[42]

He goes on to discuss the procedural aspects that either were overlooked by the plurality or were misinterpreted. He asserts that: "Considering only the factual aspects of petitioner' motivation. Justice Brennan's apparent concern that the Board's action may have been a sinister plot 'to suppress ideas may be laid to rest. In support of this contention he argues that the government is required to act in other capacities than as sovereign and when it does "the First Amendment may speak with a different voice." In the instant case he contends that actions by the government as the educator of children does not raise the same First Amendment concerns as actions by the government as sovereign. Justice Rehnquist concludes by observing that

> "...the government will far better serve the cause of First amendment jurisprudence by candidly recognizing that the role of government as soverign is subject to more stringent limitations than is the role of government as employer, property owner, or educator. It must be recognized that the government as educator is subject to fewer strictures when operating an elementary and secondary school system than when operating an institution of higher learning."[43]

Justice O'Connor in a short, succinct opinion concurred with the Chief Justice Burger and Justices Powell and Rehnquist. She observed that although she did not personnally agree with the Board's action with respect to some of the books in question, she did not believe, however, that it is the function of the courts to make decisions that have been relegated to the elected members of school boards.

Analysis

Outwardly the Pico case appears to be relatively simple constitutional issue that should have been resolved by the Federal District Court. However, as suggested by Justice Brennan, the issue consists of an important question of what First Amendment limitations are imposed on the discretion of local school boards to remove books from school libraries.[45] And as later identified, whether the removal of books amounts to an unwarranted suppression of ideas and an intent to percribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion. These questions engender other corollary questions that add complex dimensions to the original issue. For example, the very purpose of the public schools appears to stand in question. In his opinion Justice Brennan admits that local school boards must be permitted to establish and

apply their curriculum in such a way as to transmit community values and promote respect for authority and traditional social, moral, and political values.[46] Nevertheless, he circumscribes their discretion by his insistence that they must "comport" with what he believes are the transcendent imperatives of the First Amendment. He identifies the extent to which he believes the First Amendment limits local school board book removal discretion by suggesting that their discretion may not be exercised in a "narrowly partisan or political manner."[47] Except for asserting that what constitutes denial of First Amendment rights depends upon the "motivation" behind a school board's actions, he does not define what his proscription really means.[48] Justice Powell takes issue with this generalization and calling it a "standardless standard" that affords no more than subjective guidance to those required to decide whether a particular decision was made in a "narrowly partisan or political manner." He goes on to assert that "even the famous 'chancellor's foot' standard in ancient equity jurisdiction was never as fuzzy."[49]

Chief Justice Burger raises another corollary issue when he chides the plurality for suggesting that there is a new First Amendment "entitlement" to have access to particular books in a library. He takes issue with this policy on the ground that "its establishment was previously unheard of or recognized." He argues that "even assuming the desirability of the policy, there is not a hint in the First Amendment, or in any holding of the U.S. Supreme Court of a "right" to have the government provide continuing access to certain books."[50] Commenting on this point, Justice Blackmun (who joined with the plurality except for Part II-A(1) of their opinion), acknowledges that he does not "suggest that the State has any affirmative obligation to provide students with information or ideas." A n tion that "may well be associated with a right to receive." He goes on to argue that, "as a practical matter, it is difficult to see the First Amendment right that is at work playing a role in a school's choice of curriculum." He further acknowledges that the school's "finite resources - as well as the limited hours in the day - require that education officials make sensitive choices between subjects to be offered and competing areas of academic emphasis; subjects generally are excluded simply because school officials have a choice to devote their resources to one rather than another subject."[51] What appears to be crucial to Justice Blackmun is whether the State's decision to singel out an idea or subject for disapproval and then deny access to it is based on a prescription of orthodoxy, or whether the decision is based on sound educational practice.[52]

In his discussion of the variable roles the government must play, Justice Rehnquist raises a third corollary question when he asserts that "considerable light is shed on the correct resolution of the constitutional question in (the) case by examining the role played by the petitioners (the schools board)."[53] He goes on to point out that the government may act in other capacities than as sovereign, "and when it does the First Amendment may speak with a different voice."[54] Justice Rehnquist illustrates his point by citing Pickering v. Board of Education[55] wherein the court recognized that the State has interests as an employer in promoting the effeciency of the public services it performs through its employees.[56] And, by noting that expressive conduct which may not be prohibited by the State as sovereign, may be proscribed by the State as a property owner. Quoting from Adderly v. Florida, he notes: "The State, no less than a

private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated."[57] In comparing the role of the government as an educator, Justice Rehnquist observes that "when it acts as educator, at least at the elementary and secondary level, the government is engaged in inculcating social values and knowledge in relatively impressionable young people." He goes on to say

> "Obviously there are innumerable decisions to be made as to what courses should be taught, what books should be purchased, or what teachers should be employed. In every one of these areas the members of the will act on the basis of their own personal or moral views, will attempt to mirror those of the community, or will abdicate the making of such decisions to so-called 'experts'"[58]

In this connection, Justice Rehnquist cites an opinion of the Court of Appeals for the Seventh Circuit wherein Zykan v. Warsaw Community School Corporation the Court stated that it is "permissable and appropriate for local boards to make educational decisions based upon their personal, social, political and moral views."[59] Perhaps this issue is best summed up when Justice Rehnquist writes

> "I think the court will far better serve the cause of the First Amendment jurisprudence by candidly recognizing that the role of government as sovereign is subject to more stringent limitations than is the role of the government as employer, property owner, or educator. It must also be recognized that the government as educator is subject to fewer strictures when operating an elementary and secondary school system than when operating an institution of higher learning."[60]

The issue that appears to have created the most dissension among the justices is whether the courts should have intervened in the first place. For example, Justice Brenan commences his opinion by explaining that "the courts should not intervene in the resolution of conflicts which arise in the daily operation of school systems." He then limits this statement by saying "unless basic constitutional values are directly and sharply implicated in those conflicts."[61] "But we (speaking for the plurality) think that the First Amendment rights of students may be directly and sharply implicated by the removal of books from the shelves of a school library."[62]

In contra Chief Justice Burger observes that if the case becomes the law the U.S. Supreme Court could come "perilously close to becoming a 'super censor' of library decisions." He goes on to assert that "stripped to its essentials, the issue comes down to two important propositions:

> first, "whether local schools are to be administered by elected school boards, or by federal judges and teenage pupils; and
> second, whether the values of morality, good taste, and relevance to education are valid reasons for school board decisions concerning the contents of a school library."

He contends that the plurality, in its attempt to place the case within the protection of the First Amendment suggests a new "right" that would allow the Court to impose its own views about what books must be available to students." The Chief Justice then assert that he "categorically rejects (the) notion that the Constitution dictates that judges, rather than parents, teachers, and local school boards, must determine how the standards of morality and vulgarity are to be treated in the classroom."[64]

Corroborating the Chief Justice's point of view Justice Powell observes that the decision that educational worth of a book is highly subjective and that judges rarely are as competent as school authorities to make such decision; nor are they as responsive to the parents and people of the school district.65

In her short dissent, Justice O'Connor asserts that it is not the function of the courts to make decisions that have been properly relegated to the elected members of the school board. And she closes by saying: "It is the school board that must determine educational suitability..."66

Conclusions

Although the Supreme Court's decision to remand the Pico case for further fact finding leaves the fundamental issue unresolved, there are a few substantive conclusions that may be drawn. Some of them are:

1. The Justices did agree that the management of public education is properly the responsibility of the States and the local school boards. While this is certainly not a new principle, the Courts positive affirmation of it can be viewed as heartening.

2. First Amendment rights cases seem to consistently engender corollary issues that impinge on the central question. Such issues as the intervention of the Federal courts in public school management and differing application of first Amendment concerns according to the role the government is playing will not be resolved by this case. However, they will have an influential effect on the final outcome.

3. Although at present the Pico suit does not provide public school authorities with any positive guidance, it does provide some valuable enlightenment concerning policy formulation. As Justice Brennan observed: "This would be a different case if the record demonstrated that the (school board) had employed established, regular, and facially unbiased procedures for the review of controversial materials."67 In other words, the wise school board makes an affirmative attempt to publish clear and concise policy pronouncements and then consistently apply them in an unbiased manner.

Footnotes

1. Frank R. Kemmer and Stephanie Abraham Hirsh, "School Library Censorship Comes Before the Supreme Court," Phi Delta Kappan, March 1982, pp 444-448

2. Thomas Flygare, "Supreme Court Perpetuates Confusion In School Library Case," Phi Delta Kappan, November 1982, pp 208-209

3. Justice Rehnquist stated that he disagreed with Justice Bennan's opinion because it was largely hypothetical in character and because it was analytically unsound and internally inconsistent. 50 U.S.L.W. 4831, 4845

4. The nine books in the High School Library were: Slaughter House Five, by Kurt Vonnegut, Jr; The Naked Ape, by Desmond Morris; Down These Mean Streets, by Piri Thomas; Best Short Stories of Negro Writers edited by Lnagston Hughes; Go Ask Alice, of anonymous authorship; Laughing Boy, by Oliver LaFarge; Black Boy, by Richard Wright; A Hero Aint Nothing but a Sandwich, by Alice Childress; and Soul on Ice, by Eldridge Cleaver. The book in the Junior High School library was A Reader For Writers, edited by Jerome Archer 474 F. Supp. 387, 389, and nn. 2-4.

5. 474 F. Supp. 387, 390.

6. 50 U.S. W. 4833.

7. The Fixer, Laughing Boy, Go Ask Alice, and Best Short Stories by Negro Writers. 474 F. Supp., at 391, nn. 6-7.

8. The Naked Ape and Down These Mean Streets. 474 F. Supp., at 391, n. 8.

9. Soul On Ice and A Hero Aint Nothing But A Sandwich. 474 F. Supp., at 391, n. 9.

10. A Reader For Writers. 474 F. Supp., at 391, n. 11.

11. Slaughter House Five. 474 F. Supp., at 391, n. 10.

12. Laughing Boy, 474 F. Supp., at 391, n. 10.

13. Black Boy. 474 F. Supp., at 391, n. 13.

14. 474 F. Supp., at 391.

15. Id.

16. 50 U.S.L.W at 4833.

17. Id.

18. 474 F. Supp., 387 (1979).

19. Id at 392.

20. Id at 396-397

21. Id.

22. 638 F. 2d 404 (1980).

23. Id., at 414-415.

24. Id at 417.

25. Id at 432-438.

26. Id at 436-437.

27. 50 U.S.L.W. 4831.

28. Id, at 4834.

29. Id.

30. See for Example: Meyer V. Nebraska, (1923; Pierce V. Society of Sisters, (1925); West Virginia V. Barnette, (1943); Epperson V. Arkansas, (1965); Tinker V. Des Moines Independent School District, (1969); and Amback V. Norwick, (1979).

31. 50 U.S.L.W. at 4836.

32. Id.

33. Id.

34. 50 U.S.L.W. at 4840.

35. Id., at 4841-4842.

36. Id.

37. Id., at 4841.

38. Id., at 4842.

39. Id.

40. Id., at 4842-4843.

41. Justice Rehnquist disagreement was based in what is known as "The Rule of Four", i.e., that any case warranting consideration in the opinion of four Justices of the Court will be taken and disposed of on its merits. Justice Rehnquist cited the classic Ferguson V. Moore McCormack case wherein seven members of the court agreed that once centiorari had been granted, a case should be disposed of on the premise that it was properly "here", provided there were no significant considerations that were not manifest or fully apprehended at the time centiorari was granted. Justice Rehnquist suggested that Justice White's concurrence represented in effect a single vote to dismiss the writ of centiorari as improvidently granted.

42. 50 U.S.L.W. at 4845.

43. Id., at 4849.

44. Id.

45. Id., at 4834.

46. Id.

47. Id., at 4836.

48. Id.

49. Id., at 4842-4843.

50. Id., at 4840.

51. Id., at 4838, n. 1.

52. Id., n. 2.

53. Id., at 4846

54. Id.

55. 391 U.S. 563 (1968).

56. Id., at 568.

57. Adderly V. Florida, 385 U.S. 39. 47 (1967) (upholding state prohibition of expressive conduct on certain state property).

58. 50 U.S.L.W., at 4846.

59. Zykand V. Warsaw Community School Corp., 631 F. 2d 1360, 1305 (1980).

60. 50 U.S.L.W., at 4849.

61. Id., at 4835.

62. Id.

63. Id., at 4840.

64. Id., at 4840-4841.

65. Id., at 4842.

66. Id., at 4849.

67. Id., at 4837.

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